

Comptroller General
of the United States
Washington, D.C. 20548

1471329

Decision

Matter of: Blaesbjerg Marine (Texas), Inc. and Alabama Shipyard, Inc.

File: B-247975.2

Date: August 11, 1992

Paul Kirchner, Esq., Kurrus & Kirchner, for the protester.
Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith &
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interested party.

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Catherine M. Evans, Esq., and John M. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest that solicitation's delivery schedule improperly restricts competition for procurement of ships to firms that already have vessels meeting the solicitation requirements, excluding prospective offerors that wish to build new ships, is denied where agency demonstrates that it has an immediate need for the vessels, and delivery schedule is reasonably related to that need.

DECISION

Blaesbjerg Marine Texas, Inc. and Alabama Shipyard, Inc. (BAS) protest the terms of request for proposals (RFP) No. DTMA91-92-R-200079, issued by the Maritime Administration (MarAd), Department of Transportation, for ships to be used in the Ready Reserve Force (RRF). BAS complains that the RFP is unduly restrictive because it effectively limits competition to firms offering existing ships, and precludes offers for to-be-built ships.

We deny the protest.

Under the Merchant Marine Act of 1936, 46 U.S.C. App. §§ 1101 et seq. (1988), and the Merchant Ship Sales Act of 1946, 50 U.S.C. App. §§ 1735 et seq., MarAd is charged with creating and maintaining a merchant fleet that can be converted to military use in times of national emergency. As part of this responsibility, MarAd owns and maintains a number of inactive vessels that can be activated in the event of an emergency; these vessels make up the RRF. Since

the Navy's Military Sealift Command (MSC) assumes control of RRF vessels upon activation, MarAd works with that agency to develop the technical requirements for RRF vessel acquisitions.

In October 1991, the Department of Defense (DOD) and MarAd issued a joint report on the RRF, based in part on the fleet's performance during Operations Desert Shield and Desert Storm. The report concluded that, while the RRF's overall performance record was impressive, its size and condition were inadequate to ensure the same quality of performance under less favorable conditions than existed in the Persian Gulf. In particular, the report noted a shortage of roll on/roll off (RO/RO) vessels (ships with ramps that allow vehicles to be driven on and off board); the report recommended that acquisition of additional RO/ROs be given priority. In early 1992, DOD completed a congressionally mandated mobility requirements study. The study reconfirmed the immediate need for more RO/ROs to meet existing military sealift contingency requirements. The study recommended that, to meet those requirements within funding constraints, MarAd purchase 18 additional RO/ROs by 1996.¹

By the time the mobility requirements study was completed, MarAd had issued the protested RFP. The RFP contemplated the award of multiple firm-fixed-price contracts for different types of ships, including RO/ROs. Originally, the RFP provided for delivery of offered ships "at a date and time mutually agreed to between the contractor and government." The RFP was amended, however, to require delivery within 6 months after contract award. BAS, which had planned to submit a proposal for a RO/RO to be built in the United States and delivered 16 months after award, protests the amendment on the basis that the delivery schedule has the effect of unreasonably restricting the competition to offerors that already have ships complying with the RFP requirements.²

¹As the mobility requirements study is a classified document, MarAd did not provide it as part of the written record in this protest. Our statements here are based on MarAd's testimony at the hearing regarding unclassified portions of the study.

²After BAS filed its protest, the agency proceeded to accept proposals on the established closing date. BAS submitted a proposal to build a new ship; MarAd rejected it because it did not comply with the requirement for delivery within 6 months after contract award.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to promote full and open competition; restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. 41 U.S.C. § 253(a)(1)(A) and (a)(2)(B) (1988); Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7. Once the agency has established a reasonable basis for its statement of minimum needs, we will not object to an allegedly restrictive solicitation provision unless the protester establishes that the restrictive provision is not reasonably related to those needs. See CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415.

BAS contends that MarAd has not established an immediate need for RO/ROs that justifies the 6-month delivery requirement and the resulting exclusion of to-be-built ships from the competition. In this regard, BAS notes that there currently is no national emergency that would require immediate activation of RRF vessels, that neither DOD nor MSC has ever given MarAd a deadline for delivery of offered vessels, and that, under the terms of DOD's mobility requirements study, MSC will accept vessels delivered to the RRF as late as 1996. BAS also points out that, since MarAd does not currently have sufficient funding to immediately purchase all of MSC's requirements under this RFP, opening the competition to new construction would not delay the augmentation of the RRF; MarAd will still get some ships now and others later. BAS concludes that the 6-month delivery requirement serves no purpose except to exclude proposals for to-be-built vessels from the competition.

We find that MarAd has established, both in the written record and at the hearing on this protest, that MSC has an immediate need for RO/RO vessels and that MarAd's 6-month delivery requirement is reasonably related to that need. As noted above, DOD found during Operations Desert Shield and Desert Storm that the RRF does not have enough RO/ROs to meet its actual sealift requirements during a national emergency. DOD's mobility requirements study confirmed this finding, and concluded that 18 additional RO/ROs are needed to fill the RRF's capability gap.³ While the study established a 1996 target date for completing the acquisitions due to budget constraints, the need identified in the study--i.e., for an RRF adequate to meet future military contingency requirements--by its nature was an

³The study apparently also identified a need for new construction of advanced fast sealift ships of the type BAS proposes to build; both MarAd and DOD are in the process of developing solicitations for construction of ships to fill this need. Hearing transcript (Tr.) at 120 and 131.

immediate one. If the RRF shortfall could be corrected immediately, this obviously was the preferred course. This is precisely how MarAd understood its mission--to acquire as many RO/ROs as possible, as quickly as possible. Hearing transcript (Tr.) at 234-235. It therefore settled on a 6-month delivery period as the shortest time frame that would assure quick availability of the vessels while allowing offerors some time to make their ships available for sale. Tr. at 246. We think MarAd's interpretation of its mission was correct based on the DOD reports, and that the 6-month delivery requirement clearly was reasonable in light of this mission.

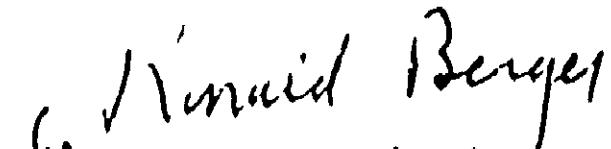
BAS' specific arguments to the contrary are unpersuasive. First, the fact that there currently is no national emergency does not change the government's need to have immediate adequate sealift capacity in the event that one does arise. Similarly, the fact that neither DOD nor MSC established a deadline for delivery of ships under the current RFP is irrelevant. As discussed above, since the agency has a legitimate immediate need for the ships, we have no basis to object to MarAd's attempt to have the ships available as soon as is realistically possible; the government is not required to compromise its legitimate needs just because an offeror cannot meet those needs. See Transtar Aerospace, Inc., B-239467, Aug. 16, 1990, 90-2 CPD ¶ 134. While it is not certain that MarAd will actually be able to purchase all 18 of the RO/ROs it needs under the current RFP, the 6-month delivery requirement ensures that MarAd will be able to fulfill its immediate need to the maximum extent possible in the shortest period of time. This is a reasonable approach; the requirement therefore is not unduly restrictive of competition.⁴ Id.

BAS maintains that the 6-month delivery requirement was based on MarAd's desire to limit the competition to vessels that it had previously identified during a market survey as desirable, and to simplify the evaluation of proposals. While there is some evidence in the record that the agency did wish to simplify the evaluation process, it does not

⁴While the 6-month delivery requirement may have excluded Blaesbjerg and other prospective offerors to-be-built vessels, we note that it does not appear to have substantially limited the competition, as MarAd received between 60 and 70 proposals for existing ships. Tr. at 14.

negate our finding that the 6-month delivery requirement was properly motivated by the agency's immediate need for ships and therefore is unobjectionable.⁵

The protest is denied.


James F. Hinchman
General Counsel

BAS also protested an RFP requirement that offered ships be in compliance with the RFP's technical requirements on the date of the offer so that MaxAd would be able to purchase them in "as is" condition. Since BAS is ineligible for award under the RFP because it cannot meet the 6-month delivery requirement, we need not consider whether the "as is" requirement is unduly restrictive in order to resolve BAS' protest.